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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MONTES ZENDEJAS,

Defendant and Appellant.

B147869

(Los Angeles County
Super. Ct. No. BA195235)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dale S. Fischer, Judge. Affirmed.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Theresa A. Cochrane, Deputy Attorneys General, for Plaintiff and Respondent.

Jesus Montes Zendejas appeals from the judgment entered following a jury trial that resulted in his conviction of failing to register as a convicted sex offender after changing his residence (Pen. Code, § 290, subd. (a)(1)(A)), a finding by the jury that he was previously convicted of violating Penal Code section 288, subdivision (b), and a finding by the court that the prior conviction was a strike within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). Appellant was sentenced to a total prison term of four years, and was ordered to pay a restitution fine of \$1,600, a parole revocation fine in the same amount, and attorney fees in the amount of \$5,000. The parole revocation fine was ordered suspended unless appellant's parole is revoked.

Appellant contends (1) that the trial court erred in instructing the jury with CALJIC No. 17.41.1; (2) that the trial court erred in ordering appellant to pay attorney fees; and (3) that, if appellant forfeited the right to contend that the trial court erred in ordering him to pay attorney fees because no objection was made to that order at the sentencing hearing, he received ineffective assistance of counsel.

FACTS

Viewed in the light most favorable to the judgment (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established the following. Appellant was convicted of a sex offense that required him to register as a convicted sex offender. In 1992, appellant was notified that throughout his life he must register as a convicted sex offender. He was told that, within 10 days of changing his residence, he needed to update his registration with the new address. Appellant last registered as a convicted sex offender on September 29, 1994, listing his address as 1108 Fedora Street in Los Angeles. In February 1998, appellant was no longer living there. Although appellant notified the Department of Motor Vehicles that he had moved to another address, 5005 August Street, Apartment 27, in Los Angeles, he did not register as a convicted sex offender at the new address.

DISCUSSION

1. CALJIC No. 17.41.1

The issue of the propriety of CALJIC No. 17.41.1 is currently pending in our Supreme Court. (*People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23,

2000, S088909; *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462.) In the meantime, we need not engage in conjecture as to how the issue will be resolved. Here, there is no indication the use of CALJIC No. 17.41.1 had any effect whatsoever on the jury's verdict. There was no jury deadlock, there were no holdout jurors, and there was no report to the court of any juror refusing to follow the law. Thus, any error in giving the instruction would not require reversal, regardless of the harmless error standard employed.

We find unpersuasive appellant's argument that instruction with CALJIC No. 17.41.1 is reversible per se. "[B]y virtue of the California Constitution, reversal is not warranted [for misdirection of the jury] unless an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 149; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1331-1335 [assuming giving CALJIC No. 17.41.1 constitutes constitutional error, it is not "structural error" and does not require reversal per se].)

2. Attorney Fees

Appellant was represented at trial and at the sentencing hearing by a Los Angeles County deputy public defender. At the sentencing hearing, the trial court stated: "The defendant must pay attorney's fees, based on his ability to pay, of \$5,000, from state prison or other funds." No objection was made to that order.

Penal Code section 987.8, subdivision (b) provides in pertinent part that when a defendant has been provided legal assistance by the public defender, upon conclusion of the criminal proceedings, the trial court may, after notice and a hearing, determine "the present ability of the defendant to pay all or a portion of the cost thereof."

Penal Code section 987.8, subdivision (e) provides in pertinent part: "If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county

in the manner in which the court believes reasonable and compatible with the defendant's financial ability."

Penal Code section 987.8, subdivision (g)(2) provides: "'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Thus, the court may in some circumstances order a defendant who has been sentenced to state prison to pay attorney fees for the costs of representation by the public defender. The court should not make such an order unless it finds unusual circumstances that show the defendant has the ability to pay. Here the probation report did not discuss whether appellant had the ability to pay for the cost of his defense. The probation report did state, however, that if probation were granted, the court should determine whether appellant had the ability to pay for the costs of incarceration. Neither appellant nor his counsel objected that appellant did not have the ability to pay. Under these circumstances, we conclude that appellant forfeited the right to contend that he did not have the ability to pay for his representation by the public defender. (See *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396.)

The order that appellant pay attorney fees does not violate Penal Code section 2085.5, since the order does not require that the fees be paid from prison wages.

3. Ineffective Assistance of Counsel

To establish that a defendant received ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's shortcomings, the outcome of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003, mod. 26 Cal.4th 797a.) If the record on appeal does not show why counsel failed to make an objection the defendant contends counsel should have made, the defendant's claim that the failure to object constituted ineffective assistance of counsel must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there simply could be no satisfactory explanation. (*Cunningham, supra*, 25 Cal.4th at p. 1003.)

As previously noted, the court may in some circumstances order a defendant who has been sentenced to state prison to pay attorney fees for the costs of representation by the public defender. (Pen. Code, § 987.8, subds. (e), (g)(2)(B).) Defense counsel may have known that appellant had the ability to pay. On this record, we cannot conclude that counsel was ineffective for failing to object to the order that appellant pay attorney fees.

DISPOSITION

The judgment is affirmed.

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_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
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